SUPREME COURT. U. S.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 656

THE CITY OF LOS ANGELES, a municipal corporation, the CITY OF LONG BEACH, a municipal corporation, ROGER ARNEBERGH and WALHFRED JACOBSON,

Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

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No. 656

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Appellants,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and C. LYN FOX, PETER E. MITCHELL, MATTHEW J. DOOLEY, THEODORE H. JENNER and EVERETT C. McKEAGE, as members of and constituting the said Public Utilities Commission,

Appellees.

On Appeal from the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

The Pacific Telephone and Telegraph Company, General Telephone Company of California, California Water & Telephone Company and Sunland-Tujunga Telephone Company, appearing herein as appellees,[1] move this Court

[1]These corporations are the real parties in interest against which appellants' attack upon the Public Utilities Commission of California is directed. They were parties to the proceedings be-

to dismiss for want of jurisdiction the appeal taken herein to this Court by The City of Los Angeles, a municipal corporation, the City of Long Beach, a municipal corporation, Roger Arnebergh and Walhfred Jacobson, appellants, upon the following grounds:

1. The appellants have no standing to assert in this Court the constitutional claims specified in the Jurisdictional Statement.

2. The issue raised by appellants is moot.

3. The appeal does not present a substantial federal question.

4. As to the individual appellants, the judgment of the Supreme Court of California rests on an adequate non-federal basis.

OPINIONS BELOW.

The judgment of the Supreme Court of California denying a writ of review (Appx. A)[2] was rendered without

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fore the Public Utilities Commission of California and participated therein. The challenged order of the Commission directly affected the rates to be charged by these four corporations. Under California law they were entitled to appear and did appear in the proceedings before the Supreme Court of California as respondents (Public Utilities Code, sec. 1758, quoted in the Jurisdictional Statement, Appendix G, p. 78). Having this status, they are parties in interest here and have standing to move to dismiss the appeal for want of jurisdiction. See *Southern Pacific Co. v. Public Utilities Commission of California* (October Term, 1953, No. 43) 346 U.S. 346.

[2]Reference herein to appendices are to those appended to the Jurisdictional Statement. "Jur.St." followed by a page number refers to pages of the text of the Jurisdictional Statement. "Ans. Pac." followed by a page number refers to the Answer of The Pacific Telephone and Telegraph Company, General Telephone Company of California, California Water & Telephone Company, and Sunland-Tujunga Telephone Company (Appearing as Re-

opinion. It is reported in 50 Advance California Reports, No. 8, Minutes, page 2. The decision of the Public Utilities Commission of California (Decision No. 55936, Appx. B, p. 3) is reported in 56 Cal.P.U.C. 80.

THE QUESTIONS PRESENTED.

Appellants state that the question presented is whether the due process clause entitles public utility customers to a hearing by a state public utility commission before the latter may authorize increases in charges for a utility's services (Jur.St. 7).[3] In other words, their claim is solely one of procedural due process, based upon the charge that they were not accorded notice or a fair hearing before the Commission entered its interim order authorizing the increased rates.

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spondents under Public Utilities Code Section 1758) to Petition for Writ of Review, filed in the Supreme Court of California, which is part of the record filed with the Clerk of this Court.

[3]Appellants attempt to lend color to their stated question by adding purported characterizations of the background against which they say the question arises (Jur.St. 7). The purported characterizations do not reflect the actual situation. Contrary to appellants' assertion, the state law does provide "for conditional increases pending a hearing before the Commission and for refunds of such increases according to a subsequent determination upon such hearing" (Jur.St. 7). The very judgment below sustained the Commission's power to order interim relief. This was an issue of state law before the California Supreme Court (see Ans.Pac. 55-56) and was decided adversely to appellants' contention (infra, pp. 12-13). Furthermore, before the interim rate increases became effective, the Commission, by its Decision No. 56109, 56 Cal.P.U.C. 140, required the keeping of records so that appropriate refunds might be made if Decision No. 55936 should be annulled (Jur.St. 10 n.). Also, the challenged order of the Commission (Decision No. 55936, 56 Cal.P.U.C. 80) did not make anything "due, owing and payable" (Jur.St. 7), but simply authorized certain increased charges for future services.

Actually, the appeal presents the questions (1) whether the appellants or any of them have standing to urge their claim in this Court, (2) whether their claim has not become moot through the final rate order of the Commission (Decision No. 56652; 56 Cal.P.U.C. 277, 23 PUR 3d 209), which, after 22 additional days of hearing, reaffirmed and made permanent the interim rates, (3) whether in point of fact appellants did not have full notice and hearing before issuance of the interim order, and (4) whether they or any of them have any constitutional right to notice or hearing in advance of a state commission order permitting interim rate increases.

STATEMENT OF THE CASE.

The Jurisdictional Statement does not accurately state the case, either factually or legally.

The Pacific Telephone and Telegraph Company on August 7, 1957, filed an application with the Public Utilities Commission of California asking authorization to increase certain intrastate telephone rates. Among the proposed rate increases were changes in the charges for message unit and multiple message unit service in the Los Angeles Extended Area.[4] A formal notice was published in all major Los Angeles newspapers and altogether in 31 sep-

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[4]Message unit telephone service is a measured service wherein time and distance factors make up the number of "units" to be charged for a completed call. The changes proposed included both an increase in the message unit rate itself, and a change in the distance factor or "mileage steps," both effecting an increase in charges (Appx. B, p. 6).

The Los Angeles Extended Area is a large area embracing numerous telephone "exchanges," wherein interexchange telephone service is furnished on a "local" rather than a "long distance"

arate newspapers published in 27 separate cities in the Los Angeles Extended Area (Ans.Pac. 11-12). Notice of the filing of the application was given by letter to the appropriate officers of the State of California and of the counties and cities in which The Pacific Telephone and Telegraph Company provides telephone service (Ans.Pac. 11).

Hearings on the application commenced September 25, 1957 (Appx. B, p. 5). The Cities of Los Angeles and Long Beach appeared (Appx. B, pp. 19-20). The four telephone companies joining in this motion were parties to other proceedings which also involved the multiple message unit service in the Los Angeles Extended Area. These proceedings were consolidated with the rate application on September 27, 1957 (Appx. B, pp. 4-6). At the hearing on that day the four companies joined in a motion for an interim rate increase affecting the multiple message unit rate (Appx. B, p. 6; Appx. E, p. 62). Hearings continued on September 27, and October 3, 4 and 10, 1957 (Appx. B, p. 6; Appx. E, p. 62). On December 10, 1957, the Commission issued the order challenged here, authorizing in part the proposed interim rate increases (Appx. B, pp. 3-23). Attendance and participation of the Cities of Los Angeles and Long Beach at these hearings are undisputed (Appx. E, p. 62; Ans.Pac. 39-48).

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basis by means of a multiple message unit rate structure. The four telephone companies which join in this motion each furnish telephone service in a part of the Los Angeles Extended Area (Appx. B, p. 6). Telephone service is unrestrictedly interchanged between the customers and territories of the respective companies through physical interconnections of their lines.

A uniform message unit rate for service furnished by the four companies in the Los Angeles Extended Area prevails under order of the Commission (Decision No. 50260 (1954) 53 Cal. P.U.C. 342).

Petitions for rehearing, filed by the appellants here, were denied on January 7, 1958 (Appxs. E and F, pp. 57-66).

The Supreme Court of California denied review on May 21, 1958 (Appx. A).

Previously, on May 6, 1958, the Commission issued its final order in the consolidated proceeding (Decision No. 56652; 56 Cal.P.U.C. 277, 23 PUR 3d 209) which reaffirmed and made permanent the interim rates.

ARGUMENT.

I.

APPELLANTS HAVE NO STANDING TO URGE THEIR CLAIMS IN THIS COURT.

Appellants are (a) two California cities, claiming to act for themselves and "in effect in behalf of all of the subscribers within the Los Angeles area who would otherwise have been without representation" and (b) their city attorneys "as individual subscribers." The appellants as a group claim to appeal "in behalf of all telephone subscribers within the Los Angeles area."[5]

A. The cities.

1. The cities have no right which they may invoke under the Federal Constitution against the legislative action of their parent state, or its duly constituted agent, the Public Utilities Commission.

As to any purported violation of their constitutional rights, Los Angeles and Long Beach as municipal corporations have no privileges or immunities under the Fed-

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[5]All these quotations appear in the Jurisdictional Statement, p. 12.

eral Constitution which they may invoke in opposition to the will of their creator, the state.

Williams v. Mayor (1933) 289 U.S. 36, 40;

R.R.Comm'n v. Los Angeles R.Co. (1929) 280 U.S. 145, 156;

Risty v. Chicago, R.I. & Pac.Ry.Co. (1926) 270 U.S. 378, 390;

Trenton v. New Jersey (1923) 262 U.S. 182, 192;

Newark v. New Jersey (1923) 262 U.S. 192, 196;

Pawhuska v. Pawhuska Oil Co. (1919) 250 U.S. 394, 399;

Worcester v. Street Railway Co. (1905) 196 U.S. 539, 548-549.

This principle applies to legislative determinations of the state's duly constituted agent, the public utilities commission.

R.R.Comm'n v. Los Angeles R.Co., supra, 280 U.S. 145, 156;

Pawhuska v. Pawhuska Oil Co., supra, 250 U.S. 394, 399.

This court has repeatedly cited the *Pawhuska* and other cases referred to above in per curiam decisions as compelling the dismissal of appeals sought to be taken by municipal corporations to invalidate rate orders of state commissions. For example:

City of Winfield v. Court of Industrial Relations (1923) 263 U.S. 680;

Borough of Edgewood v. Wilkinsburg & East Pittsburgh Street Railway Company and Borough of Edgewood v. Public Service Commission of the Commonwealth of Pennsylvania (1922) 258 U.S. 604;

City of Sapulpa v. Oklahoma Natural Gas Company (1922) 258 U.S. 608;

People of the State of Michigan ex rel. Alex. J. Groesbeck, Attorney General v. Detroit United Railway (1921) 257 U.S. 609;

City of Chicago v. Chicago Railways Company (1921) 257 U.S. 617;

City of Hillsboro, Oregon v. Public Service Commission of Oregon (1921) 255 U.S. 562;

State of Missouri at the Relation of City of Sedalia v. Public Service Commission of Missouri (1920) 251 U.S. 547;

Kansas City v. Public Service Commission of Missouri (1919) 250 U.S. 652.

2. The cities have no standing to assert the constitutional claims of others.

As to any purported violation of constitutional rights of subscribers within cities, or elsewhere within the "Los Angeles area," municipal corporations, just as any other litigant, have no standing to champion the constitutional rights of others.

Lampasas v. Bell (1901) 180 U.S. 276, 283-284;

Tileston v. Ullman (1943) 318 U.S. 44, 46;

Premier-Pabst Co. v. Grosscup (1936) 298 U.S. 226, 227;

Cronin v. Adams (1904) 192 U.S. 108, 114.

The cities' suggestion that the subscribers within the Los Angeles area would have been without representation unless the cities appeared in their behalf (Jur.St. 12) is unsound. Aside from the widespread notice of rate increase applications and the liberal practice of the Com-

mission in allowing interested parties to appear,[6] under California law the Commission itself represents the public interest in the field of public utility regulation and is charged with the protection of that interest.[7]

Sale v. Railroad Commission (1940) 15 Cal.2d 612, 617-618, 104 P.2d 38, 41-42;

Hanlon v. Eshleman (1915) 169 Cal. 200, 202, 146 Pac. 656, 657;

Pacific Telephone Etc. Co. v. Eshleman (1913) 166 Cal. 640, 137 Pac. 1119.

This Court has recognized that state regulatory authority is responsible for safeguarding the public interest.

Smith v. Ill. Bell Tel. Co. (1926) 270 U.S. 587, 592;

New York City v. N.Y. Tel. Co. (1923) 261 U.S. 312, 316,

and, on the authority of the *Pawhuska* case, it has without any differentiation dismissed appeals by municipal corporations seeking to invalidate rate orders where representation of resident subscribers was asserted.

City of Winfield v. Court of Industrial Relations, supra, 263 U.S. 680;

City of Sapulpa v. Oklahoma Natural Gas Company, supra, 257 U.S. 617;

City of Chicago v. Chicago Railways Company, supra, 257 U.S. 617.

Appellants refer to a number of cases as illustrative of instances where municipalities have appeared as rep-

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[6]For newspaper publicity, see Ans.Pac. 11-12.
For appearances of interested parties in the proceeding below, see Appx. B, pp. 19-20.

[7]The Commission so determined in the present proceeding (Appx. E, p. 61).

resentatives of "customer interests" (Jur.St. 24, n. 19). But the fact of such appearances before federal and state regulatory bodies, or in proceedings to review their actions, does not, of course, negate the *Pawhuska* rule and confer standing in this Court to argue constitutional claims on behalf of others.

B. The city attorneys as individuals.

In an admitted effort to circumvent the decisions of this Court cited above (Jur.St. 12, n. 7) the two city attorneys added their names "as individual subscribers" to the petitions for rehearing which they filed in the Commission on behalf of their principals. This was their first appearance other than in their official capacity.

1. Not having established in the record any interest in their individual capacities as to which they now claim their constitutional rights have been infringed, the city attorneys have no standing to make such claim in this Court.

The city attorneys made no showing either by testimony, documentary evidence or affidavit that in their individual capacities they were in fact subscribers for telephone service from any of the four telephone companies which join in this motion; or, if they were such subscribers, what class, type or grade of service they used; or how their service was affected by the Commission order in question.

In the absence of a showing in the record of a constitutionally protected interest, the city attorneys have no standing to challenge in this Court the order of the Commission on the ground that it infringed an unproved interest.

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments *and showing* within the class as to whom the act just attacked is unconstitutional. He must *show* that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution" (emphasis added) (*Southern Railway Co. v. King* (1910) 217 U.S. 524, 534).

To the same effect is:

Standard Stock Food Co. v. Wright (1912) 225 U.S. 540, 550.

2. Under California law, the city attorneys as individuals had no standing to seek a writ of review, the denial of which is the subject of their present appeal. As to them, therefore, the judgment rests on an adequate nonfederal ground.

Under California law only a party who has duly applied to the Commission for a rehearing is given the right to seek a judicial review of the Commission's order by means of a petition for that purpose.[8] Under the same law the right to apply for a rehearing in the Commission is given only to (a) "any party to the action or proceeding" or (b) "any stockholder or bondholder or other party pecuniarily interested in the public utility affected."[9] The city attorneys in their individual capacities were not parties to the proceeding; admittedly (Jur.St. 12) they had entered no appearance in their individual capacities

[8]Public Utilities Code, secs. 1731 and 1756; Appx. G, pp. 76-77.
[9]Public Utilities Code, sec. 1731; Appx. G, p. 76.

until all the proceedings with respect to the interim rate increase order were completed and the order had been issued. They then added their names to the cities' petitions for rehearing, without any proof in the record of their interest in the matter.

Under the California statute noted above, one not previously a party to the proceeding in the Commission, and therefore not within the class authorized to apply for a rehearing, does not acquire the status of a party simply by filing an application for a rehearing. Nor did the city attorneys show, or make any effort to show, any stockholding, bondholding, or any other pecuniary interest in any of the four public utilities affected. Not having been in a position under California law to apply to the Commission for a rehearing, they had no standing to petition the Supreme Court of California for a writ of review.

Their standing before the Supreme Court of California was duly questioned before that court (Ans.Pac. 30-31, n. 9). Since that court's denial of a writ of review, without opinion, under California law is a determination on the merits of the legal and factual issues raised in the review proceedings,

Napa Valley Co. v. R. R. Comm. (1920) 251 U.S. 366, 372-373;

People v. Western Air Lines, Inc. (1954) 42 Cal.2d 621, 630-631, 268 P.2d 723, 728, appeal dismissed (1954) 348 U.S. 859;

Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal.2d 104, 107-108, 136 P.2d 785, 787;

People v. Hadley (1924) 66 Cal.App. 370, 375, 226 Pac. 836, 839,

that point is res judicata against appellants, and the decision below in this particular rests upon an adequate non-federal ground.

Rogers v. Jones (1909) 214 U.S. 196, 204;
De Saussure v. Gaillard (1888) 127 U.S. 216, 232-234.

It is the rule of this Court that one not a party to proceedings below has no standing to appeal or petition for a writ of certiorari from the judgment therein:

Bayard v. Lombard, et al. (1850) 9 How. (50 U.S.) 530, 551;
Louisiana v. Jack (1917) 244 U.S. 397, 402;
Ex parte Leaf Tobacco Board of Trade (1911) 222 U.S. 578, 581;
Posner v. Anderson (1934) 293 U.S. 531.

3. The two city attorneys have no standing to urge the constitutional claims of other individuals.

Despite their unsupported assertions that they appeal "in behalf of all of the telephone subscribers within the Los Angeles area" (Jur.St. 12), the two city attorneys as individuals are not the champions of anyone's constitutional rights except their own (supra, p. 8).

II.

THE FINAL ORDER OF THE COMMISSION, DETERMINING THAT THE INTERIM RATE RELIEF WAS JUSTIFIED AND AFFIRMING AND MAKING PERMANENT THE RATE INCREASES FIXED THEREIN, RENDERS THE APPEAL MOOT.

The gist of appellants' claim is that lack of sufficient notice and full hearing before the interim rate increases

were ordered denied them adequate opportunity to contest the proposed rate increases. Inherent in their claim is the assumption that if they had had such opportunity, they could have succeeded in establishing to the Commission's satisfaction that the rates which the Commission subsequently ordered were unjust or unreasonable. However, after the hearings preceding the interim rate order, hearings in the matter continued for several months until a total of 32 days of public hearings had been held.[10] Here was ample opportunity for appellants to make further inquiry and offer any showing with respect to the rates in question, had they seen fit to do so.

Ultimately, on May 6, 1958, the Commission issued its final order (*Pac. Tel. & Tel. Co.*, Decision No. 56652 (1958) 56 Cal. P.U.C. 277; 23 PUR 3d 209). In this final decision, the Commission summarized the additional evidence upon the subject of the message unit rates which had been adduced during the days of hearing subsequent to the issuance of the interim order, and went on to state (56 Cal. P.U.C. 292; 23 PUR 3d 225):

> "The additional evidence leads the Commission to the further conclusion that Decision No. 55936, which authorized rate changes on an interim basis, should now be made permanent. The Commission finds, therefore, that the rate relief granted under Decision No. 55936 was justified and said decision as amended by Decision No. 56048 with respect to its effective date is hereby affirmed and made permanent."

The result is that upon completion of all hearings, including all showings that were offered and received and

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[10] *Pac. Tel. & Tel. Co.*, Decision No. 56652 (1958) 56 Cal.P.U.C. 277, 279; 23 PUR 3d 209, 213 (the final decision).

all cross-examination, the Commission ended with the determination that the rates in question were (and had been from the time fixed in the interim order) just and reasonable. This disposes of any intimation by appellants that they suffered any injury as a result of the interim rate order.

In short, even if both the judgment appealed from and the Commission's interim rate order were set aside, the final order of the Commission reaffirming the rate increases embodied in the interim order still confronts the appellants. The final order renders moot the present challenge of the interim order. The case is like those in which an order denying a preliminary injunction has become merged in a final judgment denying injunction; in such cases this Court has dismissed appeals from the orders denying the temporary injunctions.

Champlin Rfg. Co. v. Commission (1932) 286 U.S. 210, 212, 224;

Pacific Tel. Co. v. Kuykendall (1924) 265 U.S. 196, 205-206;

Shaffer v. Carter (1920) 252 U.S. 37, 44.

III.

THE APPELLANT CITIES ACTUALLY APPEARED IN THE PROCEEDINGS BEFORE THE COMMISSION WHICH CULMINATED IN THE CHALLENGED ORDER, AND WERE GIVEN FULL OPPORTUNITY TO AND DID PARTICIPATE IN THE VARIOUS PHASES OF THESE PROCEEDINGS, INCLUDING CROSS-EXAMINATION AND ARGUMENT. THERE IS NO FACTUAL BASIS FOR THEIR CLAIM THAT THEY WERE DENIED ADEQUATE NOTICE AND HEARING.

In point of fact, appellants' claims that the Commission denied them adequate notice and hearing are specious. As indicated above, the two city attorneys did not see fit to appear in their individual capacities until after the interim order had issued (and then nominally joined in petitions for rehearing for the avowed purpose of circumventing the "*Pawhuska* rule," supra), although they had previously appeared on behalf of their municipal principals and obviously knew all about the hearings. The two cities were represented throughout the proceedings (Appx. B, pp. 19-20, Appx. E, p. 62).

A. Appellants have produced no record to contradict the Commission's determination that due notice and hearing were accorded.

The Commission determined that appropriate notice and a full hearing had been accorded, in its Decision No. 56048 denying the petition of the City of Los Angeles and Roger Arnebergh for a rehearing (Appx. E). The Commission said (Appx. E, pp. 60-62):

> "• • • the burden of the petition is that due process of law was denied petitioners, lawful notice of the proposed interim increase of rates was not given • • •.
>
> The record in these proceedings and the law constitute a complete refutation of petitioners' unsupported allegations.
>
> • • • • •

> The repeated assertion by petitioners in their petition for rehearing that a full hearing was not accorded the parties on the motion by the telephone companies for interim relief is incorrect and the record irrefutably so shows. Hearings on the two complaints were held on September 19, 20, and 26, 1957. * * * On the third day of hearing in the application proceeding (September 27, 1957) * * * the four telephone utilities made a motion for interim relief, and hearings thereon were held on September 27, October 3, 4 and 10, 1957. Petitioner City of Los Angeles appeared at all of the above hearings.
>
> After the telephone companies had presented their evidence in support of such motion and the protesting and interested parties including the City of Los Angeles,[11] had cross-examined the witnesses for the telephone companies, the presiding officer inquired of these parties if they had any evidence to offer in connection with the motion for interim relief and they answered in the negative. No suggestion or request was made by any of these parties for a continuance to enable said parties to present evidence. Also, the motion for interim rate relief was argued by the parties, including the City of Los Angeles and other protesting and interested parties. In these circumstances, the repeated insinuation of petitioners that the interested parties were denied an opportunity to be heard and that a full hearing was not had on the motion for interim relief is disingenuous, to say the very least."

Appellants' conduct parallels the situation in *Market Street R. Co. v. Comm'n* (1945) 324 U.S. 548, where this Court said (p. 559):

> "But even if a more convincing showing were made that the Company had relevant evidence to be heard,

[11]These interested parties also included the City of Long Beach, appearing by Walhfred Jacobson (Appx. B, p. 20).

> we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

In the record on this appeal, the above determination by the Commission is not contradicted by any showing to the contrary. Appellants have not supported their naked assertions as to lack of due notice and hearing by bringing up the record before the Commission to show, if they could, that the Commission's determination was erroneous. In such a situation this Court will accept the findings of the Commission as correct.[12]

Miss. Valley Barge Co. v. U.S. (1934) 292 U.S. 282, 286;

Edward Hines Trustees v. U.S. (1923) 263 U.S. 143, 148;

Nashville Ry. v. Tennessee (1923) 262 U.S. 318, 324.

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[12]There are in the record before this Court several statements paraphrasing the record before the Commission and also verbatim excerpts from that record, which show beyond question that the cities were given every opportunity to cross-examine witnesses and make any affirmative showing that they saw fit. These statements and excerpts appear in the answer of The Pacific Telephone and Telegraph Company, et al., to petition for writ of review (supra, p. 2, n. 2) pp. 39-48.

While the appellants say that the "factual assertions in denial or avoidance" in the answers to the appellants' petition for writ of review were "traversed by the appellants' reply" (Jur.St. 8), their reply failed either to challenge the accuracy of any of the excerpts from the record or to produce any contradictory evidence or record references whatever.

B. The appearances of appellant cities by the appellant city attorneys in the Commission proceedings waived any objection to the adequacy of notice.

The participation of the appellant cities by their city attorneys in the Commission proceedings has already been noted. It is fundamental that the actual appearance of a party at a proceeding waives any objection to the adequacy of notice of such proceeding.

United States v. Miller (1943) 317 U.S. 369, 382;
Doty v. Love (1935) 295 U.S. 64, 74;
Detroit &c. Ry. v. Osborn (1903) 189 U.S. 383, 391.

IV.

IN ANY EVENT THE APPELLANTS HAVE NO CONSTITUTIONAL RIGHT TO NOTICE AND HEARING, BEFORE THE COMMISSION WAS ENTITLED TO MAKE ITS ORDER INCREASING TELEPHONE RATES ON AN INTERIM BASIS.

Even if the appellants were right in their contentions that they were denied adequate notice and hearing before the Commission's interim rate order issued, that fact would not avail them a remedy here. They have no constitutionally protected right to prior notice and hearing because (a) the Commission itself represents the public interest in rate-making proceedings, (b) the state law affords utility customers adequate protection against arbitrary rate-fixing action by giving them a right, under section 1702 and section 1704 of the California Public Utilities Code,[13] to challenge before the Commission any

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[13] "1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or

"charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law * * *" (Cal.Pub.U.Code, sec. 1702), and (c) as subscribers, appellants have no such property interest in the rates fixed for public service corporations as to entitle them or each customer or potential customer to notice and hearing before the Commission can increase a particular rate.

This Court recognized all three of these grounds in *United States v. Merchants &c. Ass'n.* (1916) 242 U.S. 178, a case arising under the Interstate Commerce Act. In disposing of the contention of certain shippers that they had been denied their right to a hearing in the rate-making proceeding, this Court declared (p. 188):

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organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service" (Appx. G, p. 74).

"1704. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than 10 days before the time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date."

"The carrier is the only necessary party to the proceeding under §4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable or unjustly discriminatory, §§ 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief 'but were denied the right of a hearing' and that 'their protest and demand were ignored and denied.' What they did was to petition for a 'rehearing' in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discrimination might result in creating infinitely more. The decree of the District Court cancels the amended order and the tariff only so far as it concerns the four complaining cities and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities."[14]

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[14]In accord with *United States v. Merchants &c. Ass'n.*, state court cases hold that notice to and a hearing for consumers are not constitutional prerequisites to the issuance of rate orders. See:

State v. Rawlings (1951) 229 Ind. 552, 99 N.E.2d 597, 602;
Gateway City Transfer Co. v. Public Service Commission (1944) 245 Wis. 304, 14 N.W.2d 6, 7-8;

The same situation prevails in California. It has already been pointed out that (1) the California Public Utilities Commission is expressly charged with the representation of the public interest (supra, p. 9) and (2) utility customers have adequate right to challenge any rate and have a hearing thereon, afer the rate has been fixed, under sections 1702 and 1704 of the California Public Utilities Code (supra, p. 19).

Moreover, it is settled that the subscribers' right to service exists only because of statute and is not such a property right as may form the basis of a claim of confiscation. A leading case is the decision of the United States Circuit Court of Appeals for the Second Circuit:

> *United States Light & Heat Corp. v. Niagara Falls G. & E. L. Co.* (2 Cir. 1931) 47 F.2d 567, 570, certiorari denied (1931) 283 U.S. 864.

In accord are numerous state court cases.[15]

Lenihan v. Tri-State Telephone & Telegraph Co. (1940) 208 Minn. 172, 293 N.W. 601, 605, certiorari denied (1940) 311 U.S. 711;

Consumers' Gas Co. v. Corporation Commission (1923) 95 Okl. 57, 219 Pac. 126, 129;

City of Bartlesville v. Corporation Commission (1921) 82 Okl. 160, 199 Pac. 396, 398;

City of Atlanta v. Georgia Ry. & Power Co. (1919) 149 Ga. 411, 100 S.E. 442, 444-445;

Union Dry Goods Co. v. Georgia Public Service Corp. (1916) 145 Ga. 658, 89 S.E. 779, affirmed (1919) 248 U.S. 372.

[15]*City of Birmingham v. Southern Bell Tel. & Tel. Co.* (1937) 234 Ala. 526, 176 So. 301, 306-307;

City of New Haven v. New Haven Water Co. (1946) 132 Conn. 496, 45 Atl.2d 831, 838-839;

State v. Mountain States Tel. & Tel. Co. (1950) 54 N.M. 315, 224 P.2d 155, 161-166;

Prior notice and hearing to all utility customers before a public utilities commission could raise a rate, even on an interim basis, would be intolerable from the practical standpoint. If the Commission were required to give notices and hold hearings before it could increase any of the thousands of separate utility rates on file in California, upon pain of having the amended rates set aside as unconstitutional, the legislative function of rate making would be clogged to the point of paralysis.

Neither of the decisions of this Court with which appellants say the judgment conflicts—*Hollis v. Kutz* (1921) 255 U.S. 452; *Wichita R. R. v. Pub. Util. Comm.* (1922) 260 U.S. 48 (Jur.St. 2, 19, 25-26)—furnishes any support for their contention. In the *Hollis* case the Court interpreted a federal statute as permitting gas consumers to challenge a rate order of the Public Utilities Commission of the District of Columbia in an equity suit without having appeared in the commission hearing or having asked the commission to review its decision; and further held that "the plaintiffs have no right to require equality [of rates] with the Government and they have no other ground upon which to found their supposed right" (255 U.S. 455). Nothing in the decision suggests that the

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Boston Real Estate Bd. v. Department of Public Util. (1956) 334 Mass. 477, 136 N.E.2d 243, 251-252;

State v. Municipal Corporations of Scotland Neck (1955) 243 N.C. 193, 90 S.E.2d 519, 528;

Ten Ten Lincoln Place v. Consolidated Edison Co. (1947) 190 Misc. 174, 73 N.Y.S.2d 2, 5-6, affirmed (1948) 273 App.Div. 903, 77 N.Y.S.2d 168, leave to appeal denied (1948) 298 N.Y. 937, 80 N.E.2d 547;

Childs v. Brooklyn Edison Co. of N.Y. (Supreme Ct., Kings Co. Pt. I, 1951) 105 N.Y.S.2d 503, 508-509;

McCormick v. Westchester Lighting Co. (1931) 141 Misc. 261, 252 N.Y.S. 454, 458.

consumers had a right, protected by the Federal Constitution, to a hearing before the commission prior to an order allowing increased rates.

The *Wichita* decision struck down an order of the Kansas Public Utilities Commission increasing utility rates fixed by private contract prior to the commission's inception, on the ground of a Kansas statutory requirement that an express finding of unreasonableness by the commission was indispensable and had not been made (260 U.S. 59). This determination obviated any decision upon the plaintiff's claim that the commission order violated its constitutional rights.[16] The other holding in the case, that the plaintiff was entitled, in its action to test its claim that the order of the commission had infringed its constitutional rights, to an opportunity to maintain by evidence and argument before the district court the issue as to due process of law and equal protection of the law (260 U.S. 55), has no relation to the issue here. Under California law, opportunity to maintain such an issue by evidence and argument is afforded by Public Utilities Code section 1702, supra.[17]

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[16]Any suggestion that even a consumer *with a contract* is constitutionally entitled to notice and hearing before the Commission, on the propriety of rates to be fixed under a regulatory statute, is answered by this Court's decision in *Midland Co. v. K. C. Power Co.* (1937) 300 U.S. 109, 114. As this Court said in *United Gas Co. v. Mobile Gas Corp.* (1956) 350 U.S. 332, 345-346:

> "In *Midland* • • • the Court held only that a statute interpreted by the state court as authorizing unilateral contract changes by a public utility was not unconstitutional. On the other hand, in *Wichita* this Court interpreted a Kansas statute, not yet fully construed by the state court, as not giving such a power to a public utility • • •."

[17]In a footnote (Jur.St. 19) appellants refer to *Panama Refining Co. v. Ryan* (1935) 293 U.S. 388 and *Mahler v. Eby*

Appellants cite a number of cases as conflicting "in principle" with the judgment below (Jur.St. 26). With two exceptions[18] these cases simply restate the established doctrine that the property of a public service corporation, dedicated to public use, is protected from confiscation by the requirements of due process.

(1924) 264 U.S. 32 as citing the *Wichita* case. They have no relevance here. Their holdings that a federal agency must make findings in support of its orders were based on the constitutional framework of the federal government in order to prevent an unconstitutional delegation of congressional legislative power to administrative agencies. The case here involves the framework of state government, with no similar inhibition (Cal. Const., Art. XII, secs. 22 and 23). The fact that the California legislature, by statute, has imposed a requirement of Commission findings in certain instances (e.g., Public Utilities Code section 454; Appx. G, p. 70) does not make the requirement a constitutional one.

[18] *In re Oliver* (1948) 333 U.S. 257 is not even in the utility field. It involved the requirements of procedural due process where a suspected criminal was imprisoned without a hearing. The case has no bearing here.

Hollis v. Kutz (1921) 225 U.S. 452 is discussed supra, p. 23.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the appeal should be dismissed.

Dated, San Francisco, California,
February 17, 1959.

Respectfully submitted,

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